AUG 21 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 53

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

vs.

SIERRA PACIFIC POWER COMPANY,

Brief for the Pacific Gas and Electric Company

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

ROBERT H. GERDES
F. T. SEARLS
245 Market Street
San Francisco 6, California

ROBERT E. MAY
WHEAT, MAY AND SHANNON
520 Shoreham Building
Washington 5, D. C.

Attorneys for Petitioner, Pacific Gas and Electric Company

Of Counsel:

JOHN C. MORRISSEY
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California

PARKER PRINTING COMPANY, 190 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	3
Summary of Argument	7
Argument	10
I. This rate increase proceeding was lawfully initiated by P. G. & E.'s filing of the proposed increased rate schedule	10
A. The language of the Act contemplates that all utility-initiated rate proceedings shall be brought under Section 205	11
1. Section 205 of the Act expressly authorizes a public utility to initiate a change in any rate, including a contract-specified rate, through the rate filing procedure	11
2. Section 206(a) of the Act does not authorize a public utility to initiate a rate proceeding	14
B. There is no substantive reason why the statutory language should not be literally applied	16
1. The choice does not lie between a procedure which abrogates contracts and a procedure which does not	16
2. The end result, the just and reasonable rate, must be the same under either procedure	17
C. The interpretation of the court below is based upon an erroneous view of the Commission's rate making authority which would impair its effectiveness	21

Page

D. The use of Section 205(e) gives both parties the benefit of the equitable collection and refund procedure 23

E. The *Mobile* and *Wichita* cases do not support the holdings of the court below 25

1. The court below erred in relying on Mobile 26

2. The reasoning of *Wichita* is not applicable to the case at bar 28

II. In any event, the Commission actually found, upon an expressly framed issue, that the contract-specified rate was unreasonable before authorizing the rate increase 29

A. The issue of whether the 1948 contract-specified rate was reasonable or unreasonable was presented to the Commission in this proceeding 31

B. The Commission expressly found the 1948 contract-specified rate to be unreasonable 33

C. Even assuming that an express finding were lacking there is an implied finding which is sufficient to support the Commission's order 35

III. It was error to order the proceeding dismissed when the finding, if required, could have been supplied on remand and when dismissal would constitute a rate decision which only the Commission could make 36

A. Even if the Commission had not found the 1948 contract-specified rate to be unreasonable, it should be permitted to do so in this proceeding 36

B. The court below, by refusing to permit the Commission in this proceeding to find unreasonable the 1948 contract-specified rate, has usurped the Commission's regulatory authority 38

IV. The order of the Commission is fully supported by the evidence 40

Page

A. The lawfulness of the new rate is supported by the evidence 40

1. The cost of service method of testing reasonableness shows the new rate to be reasonable 40

2. The rate of return under the new rate will not exceed the rate of return expected under the 1948 contract-specified rate 40

3. The Commission gave careful consideration to Sierra's special situation arguments and rightly rejected them 41

B. The unreasonableness of the 1948 contract-specified rate is well established by the evidence 42

Conclusion 44

Appendix

INDEX OF AUTHORITIES

Cases	Pages
Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301	37
Central Illinois Pub. Service Co. v. Illinois Commerce Commission, 125 N.E. 2d 269	18
Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581	34
Far East Conference v. United States, 342 U.S. 570	39
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591	22
Federal Power Commission v. Idaho Power Company, 344 U.S. 17	39, 40
Federal Power Commission v. Mobile Gas Service Corporation, (pending on writ of certiorari, Nos. 17 and 31, this Term; prior opinion, 215 F.2d 883)	12, 14, 17, 24, 25, 26, 29
Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 25 P.2d 415	36
Gross v. Saginaw Broadcasting Co., 305 U.S. 613	35
Johnston Seed Co. v. United States, 191 F.2d 228	35
Kustoff v. Chaplin, 120 F.2d 551	35
Midland Realty Co. v. Kansas City Power and Light Co., 360 U.S. 109	27, 28
Mobile Gas Service Corp. v. Federal Power Commission, 215 F.2d 883	21, 24, 25, 26, 27, 28
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246	12, 19
Munn v. People of Illinois, 94 U.S. 113	16, 17
National Labor Relations Board v. Hearst Publications, 322 U.S. 111	14
National Labor Relations Board v. Mackay Radio & T. Co., 304 U.S. 333	33
New York Central & H. R. R. Co. v. Interstate Commerce Commission, 168 Fed. 131	33
Pennsylvania Water and Power Co. v. Federal Power Commission, 343 U.S. 414	13
Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737	35

Pages

Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554 ..... 35, 36
Skidmore v. Swift & Co., 323 U.S. 134 14
Suburban Water Co. v. Borough of Oakmont, 268 Pa. 243, 110 A. 778 17
Tyler Gas Service Co. v. United Gas Pipe Line Co., D.C. Tex., Dec. 23, 1953, affmd. 217 F.2d 73 ..... 26, 27
U. S. v. Public Utilities Commission, 345 U.S. 295 3
Wichita R. R. & Light Company v. Public Utilities Commission, 260 U.S. 48 ..... 26, 28, 29

STATUTES

Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a-825r 2
Section 205 ..... 2, 4, 6, 8, 11, 13, 14, 29, 30, App. 1
Section 205(a) 11, 12
Section 205(b) 12
Section 205(c) 11, 12
Section 205(d) 7, 8, 10, 11, 12, 15, 16, 17, 18, 21, 29, 32, 38
Section 205(e) 8, 13, 15, 18, 19, 20, 21, 23, 24, 26, 29, 30, 37
Section 206 ..... App. 1
Section 206(a) 2, 4, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, 30, 38
Section 306 15
Section 308 31
Section 313(b) 2

Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, et seq.:
Section 4(e) 24, 25, 26, 27
Section 5(a) 25

Kans. Sess. Laws 1911, c. 238:
Section 13 28
Section 20 29

FEDERAL POWER COMMISSION REGULATIONS

(Title 18, Code of Federal Regulations)

Rule 35.3 3
Rule 35.3(c) 13

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 53

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

vs.

SIERRA PACIFIC POWER COMPANY,

Brief for the Pacific Gas and Electric Company

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPINIONS BELOW

The opinion of the Court of Appeals may be found in the Transcript of Record at pp. 478-482, and the Court's Order of March 23, 1955, amending its opinion may be found in the Transcript of Record at p. 495. (All references to the record herein will be made to the page number of the Transcript of Record.) The opinion of the Court of Appeals as amended is reported in 8 P.U.R. 3d 279. The Opinion of the Federal Power Commission is reported in 7 P.U.R. 3d 256, and may be found in the Transcript of Record at pp. 443-477.[1]

1. The Opinion of the Circuit Court, the amendment thereto, and the Opinion of the Commission are also reprinted in Appendices A, B, and C, respectively, of Pacific Gas and Electric Company's Petition for a Writ of Certiorari previously filed in this proceeding.

This is the companion case to *Federal Power Commission v. Sierra Pacific Power Company*, Case No. 51, now pending in this Court, and the Transcript of Record in that case is the same as in this case.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on February 24, 1955, and thereafter amended on March 23, 1955. The Petition for Writ of Certiorari was filed on April 22, 1955, and was granted on May 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825 l).

STATUTE INVOLVED

Pertinent provisions of the Federal Power Act, (49 Stat. 838; 16 U.S.C. 791a-825r), sometimes referred to herein as the "Act", are printed herein as Appendix.

QUESTIONS PRESENTED

1. May a public utility initiate a rate increase under Section 205 of the Federal Power Act where the existing rate is specified in a contract?
2. Where the Federal Power Commission expressly found, upon a framed issue, that the contract-specified rate was unreasonable, could it authorize a rate increase with the same effect as though the proceeding had been initiated under Section 206(a) of the Act, which expressly requires such a finding, even though it was actually initiated under Section 205 which does not expressly require such a finding?
3. Assuming the Commission's order herein is deficient for lack of such a finding, should not the proceeding be

remanded with instructions to make a finding upon the issue, rather than be dismissed?

STATEMENT

Since 1923 Pacific Gas and Electric Company (hereinafter called PG&E), a public utility, has supplied increasing amounts of electric power at Donner Summit in California to Sierra Pacific Power Company (hereinafter called Sierra), a public utility, for resale to Sierra's retail customers in California and Nevada. In 1948 PG&E entered into the third of a series of contracts which set out the terms and conditions under which these power deliveries were made. This contract also specified the rate and, like the contract which it superseded, was filed with the Federal Power Commission (hereinafter called Commission), which designated it as PG&E's Rate Schedule F.P.C. No. 3 (R. 138-146) and fixed its effective date as of January 1, 1948. In light of *U. S. v. Public Utilities Commission*, 345 U.S. 295 (1953), the jurisdiction of the Commission over all sales under the 1948 contract is clear and the Commission so found (R. 468).

The 1948 contract by its terms would extend 15 years after the operative date of the second of two 110,000 volt transmission lines to be constructed to serve Sierra's growing load. The evidence indicated that the terminal date was estimated as 1971.

On February 2, 1953, in order to meet a very substantial increase in its costs of serving Sierra, PG&E initiated the present proceeding by filing with the Commission a proposed increase in the Sierra rate, designated Supplement No. 1 to Schedule F.P.C. No. 3 (R. 428), together with supporting data as required by the Commission's rules (18 C.F.R. 35.3).

The Commission thereupon invited the Public Utility Commission of California, the Public Service Commission of Nevada, and Sierra to comment upon the proposed increase. The California Commission made no comment. Both the Nevada Commission and Sierra protested and requested a hearing. Sierra claimed that the proposed new rates were unjust and unreasonable because the 1948 contract-specified rates had been designed to meet a competitive situation and because, in any event, its contract rights could not be changed under Section 205 of the Federal Power Act, but only under Section 206(a) of the Act upon a finding that the 1948 rates were unlawful (R. 445).

On March 13, 1953, the Commission ordered a hearing concerning the lawfulness of the proposed rate increase and ordered the rate suspended for five months following the proposed effective date of April 6, 1953 (R. 431-434), after finding that the proposed rate might be "unjust, unreasonable, unduly discriminatory or prejudicial" (R. 433), and that it was "necessary, desirable, and in the public interest" (R. 433) to hold such hearing. Sierra petitioned for leave to intervene which was granted, and also to have the filing rejected. The Commission denied the latter request without prejudice to Sierra's right to thereafter maintain its contentions (R. 445-446).

The Commission held 10 days of hearings during which both Sierra and PG&E presented evidence. In briefs filed at the conclusion of the hearings PG&E requested a finding, among others, that the 1948 contract-specified rate was unreasonable and Sierra requested a contrary finding.

The statutory maximum period for suspension of the proposed rate increase expired on September 6, 1953, and PG&E was authorized to place the increase in effect subject

to refund of any portion thereof not found justified (R. 440-442).

By order issued September 21, 1953, the Commission ordered further argument on six questions directed to actual costs, revenue and rate of return under the 1948 contract-specified rate, as compared with results foreseen or reasonably foreseeable at the time the contract was made. The Commission held further hearings on two days in March, 1954, to receive further evidence with respect to these questions. Oral argument followed and on June 17, 1954, the Commission issued its opinion and findings (R. 443-470) with two dissents (R. 471-477).

The Commission found that the proposed rate was not unjust, unreasonable, unduly discriminatory or preferential (R. 469-470). It determined that the proposed rate would not provide more than PG&E's cost of rendering service to Sierra (R. 448), noting that the evidence showed the proposed rate would yield PG&E a return of 4.75% on a net investment rate basis (R. 449), while 5½% would be a reasonable rate of return for its electric operations as a whole (R. 448).[2]

The Commission rejected Sierra's contention that because the 1948 contract-specified rate was negotiated under competitive conditions it necessarily remained just and reasonable (R. 450-451). It determined that Sierra had not foregone other sources of electric supply in reliance upon the continuance of all terms of the 1948 agreement, the evidence clearly indicating that in 1948 Sierra regarded other sources of supply as unacceptable (R. 451). No unfairness was found in changing the rates while all other terms of the contract were

2. Sierra did not contest the showing of a 4.75% return and stipulated to the reasonableness of a 5½% return for PG&E's electric operations as a whole, without conceding its materiality. (R. 21).

left in force because Sierra could not suggest any changes it would desire (R. 451). An extensive examination was made of the foreseeable rate of return to PG&E under the 1948 agreement, and the Commission determined that due to the increased cost of serving Sierra the proposed new rate would merely restore to PG&E the rate of return reasonably foreseen and foreseeable in 1948, and no more (R. 452-455).

Turning to Sierra's contention that Section 206(a) rather than Section 205 of the Federal Power Act governed the proceeding here, the Commission, after serious and extensive consideration, rejected it as not being in accord with the law or the Commission's long-standing construction of Section 205 of the Act (R. 437-464). However, the Commission pointed out that "If a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464), that "none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate" (R. 464), and that "no such considerations [as raised by Sierra] on this record warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful" (R. 466). The Commission expressly made its opinion a part of its findings by incorporation and reference (R. 466).

Sierra's petition for rehearing was denied and it petitioned the Court of Appeals for the District of Columbia Circuit for review. The Court of Appeals, in a decision rendered February 24, 1955, (R. 478-482) directed that the Commission's order be set aside on the sole ground that

the contract-specified rate could not be increased except by a proceeding under Section 206(a) of the Act in which a finding was made that the contract-specified rate was unlawful.

The Court originally directed that the case be remanded for dismissal or for further proceedings under Section 206(a) of the Act. However, on March 23, 1955, in response to a motion by Sierra, the Court modified its order and directed the Commission to dismiss the proceeding, but without prejudice to the initiation of a new proceeding under Section 206(a) (R. 495). Thus, PG&E was to be denied any consideration of the merits of its case in the instant proceeding.

SUMMARY OF ARGUMENT

In 1953 PG&E was supplying power to Sierra under a contract executed five years before, when its costs were far lower. To initiate a rate increase proceeding, PG&E filed a proposed increased rate under Section 205(d) of the Act. The Commission held hearings, considered and decided all possible issues and finally allowed the increased rate to stand effective.

I.

The initiation of the proceeding under Section 205(d) was proper because it complied with the express language of that section, which makes no distinction between contract-specified rates and other rates. Interpretation of Section 205 to authorize use of the filed rate procedure with respect to contract-specified rates follows the rule generally adopted in other jurisdictions with similar statutes.

The Section 206(a) procedure, which the court below thought should have been followed, was not intended for rate proceedings initiated by the utility. This section authorizes action upon the initiative of the Commission or

upon complaint and does not authorize a utility to complain against its own rates.

The use of the Section 205 procedure does not "abrogate" contracts as the court below thought. It is conceded that contracts for public utility service are subject to regulation and the only possible question here is the choice of the procedure under which such regulation is to be effected.

In any event, either procedure would give the same end result: the just and reasonable rate for the service rendered. Hence, there is no reason to depart from the express language of Section 205(d) of the Act authorizing a contract to be changed by a process initiated by the filing of a new schedule. The court below thought it was significant that the Section 206(a) procedure would have required a separate finding that the old rate was unreasonable before any change could be made. However, a finding under the Section 205 procedure that the new proposed rate is reasonable makes it unnecessary to find that the old rate was unreasonable. If the Commission finds a rate to be reasonable a materially different rate is necessarily unreasonable. When the court below stated that there is a statutory area within which rates may be reasonable, it confused the function of judicial review, which permits the Commission to operate within an area, with the function of Commission rate determination, which reduces the statutory standard to a precise dollars and cents evaluation.

The Commission would be severely handicapped if it had to accept any rate within an area as reasonable. This court should reject the views of the court below and reaffirm its prior determinations that Congress gave the Commission the power under both Section 205 and Section 206(a) to determine the particular rate which is just and reasonable for the service being rendered.

The fact that the proposed rate increase under section 205(e) may go into effect after a five months' suspension period does not burden Sierra. The increase is subject to refund at the conclusion of the hearing to the extent that it is found not justified. The result is only that Sierra pays no more and no less than the rate which the Commission ultimately determines to be reasonable. This is an equitable device for minimizing the hardships of delay in regulatory proceedings and is applicable to contract-specified rates just as clearly as to any other rate.

II.

In this case, it should be immaterial whether the proceeding was properly initiated. The only feature of the Section 206(a) proceeding which the court below found absent in the present proceeding was a finding that the old contract-specified rate was unreasonable. It did recognize that the Commission declared that, if such a finding were necessary, the finding would have to be that the old rate was unreasonably low and, therefore, unlawful. The Commission expressly incorporated all of its opinion, including this statement, in its findings. There is no formal defect in the way in which the finding was made.

The court below, however, disregarded the Commission's statement because it was made in a proceeding in which the court thought the unreasonableness of the old contract-specified rate was not an issue. In this, the court clearly erred because Sierra raised the issue at the outset, evidence was taken thereon, findings were requested thereon and the Commission considered it in detail and expressly disposed of it. Substantively, nothing more could have been necessary to dispose of the issue, and, procedurely, there is no reason whatever to require anything more.

III.

If anything more was required to dispose of this case, the court below should have remanded the matter with instructions to the Commission to make a further finding so that neither party would be prejudiced by the Commission's failure to follow what the court deemed to be the correct procedure. A dismissal by the court at this point amounts to a determination of PG&E's rate for a period of over two years, a determination which should be made only by the Commission in its expert capacity.

IV.

The Commission's findings are fully supported by the evidence and there is no occasion for a court to substitute its own determination as to the facts.

ARGUMENT

I. This Rate Increase Proceeding was Lawfully Initiated by PG&E's filing of the proposed increased rate schedule.

Did P.G.&E. correctly initiate this rate increase proceeding by filing its proposed rate in accordance with Section 205(d)? The Court of Appeals decided, by implication[3], that it did not and that this error nullified the entire proceeding.

3. Actually the court below nowhere states that the filing by PG&E under Section 205(d) was not authorized. The court's opinion deals solely with the proposition that a contract-specified rate can be changed only if the finding required by Section 206(a) is made. The court's dismissal of the proceeding arguably has left the filed increase in effect, since the "dismissal" ordered by the court would seem to be equivalent to the "termination" ordered by the Commission (which expressly left the filed increase in effect). Nevertheless, it seems advisable for us to assume in arguing this point, that the court below intended to nullify PG&E's filed rate increase. Point II, infra p. 30, shows that the finding which the court below required was actually made in clear and express terms after full consideration.

PG&E is a "public utility" as defined in Part 2 of the Federal Power Act and many phases of its business are subject to regulation by the Federal Power Commission under the various provisions of that Act. In particular, Section 205 sets forth (1) the standards which it must observe in fixing rates for interstate sales of power at wholesale, such as sales to Sierra, (2) the manner in which such rates shall be established initially and thereafter changed by the utility and (3) the authority of the Commission to suspend, hold hearings on and set aside any such change. Section 206(a) gives the Commission authority to review existing rates at any time either on its own initiative or on complaint.

Although Section 205 expressly applies to contracts, as well as rates, Sierra contends that PG&E could not initiate a change in its 1948 contract-specified rate for service to Sierra by filing a proposed higher schedule under Section 205(d). This contention is contrary to the Act for the reasons which follow.

A. THE LANGUAGE OF THE ACT CONTEMPLATES THAT ALL UTILITY-INITIATED RATE PROCEEDINGS SHALL BE BROUGHT UNDER SECTION 205.

1. Section 205 of the Act Expressly Authorizes a Public Utility to Initiate a Change in Any Rate, Including a Contract-Specified Rate, Through the Rate Filing Procedure.

In express terms, Section 205 deals with rates in all their aspects including standards, classifications, practices, regulations and contracts affecting or relating to rates.

Under Section 205(a) of the Act all rates and charges of a public utility for electric service must be "just and reasonable". Under Section 205(c) of the Act every public utility "shall file with the Commission * * * and shall keep open in convenient form and place for public inspection schedules showing all rates and charges * * * together with all con-

tracts which in any manner affect or relate to such rates, charges, classifications and services." This court has already decided that a contract-specified rate becomes effective not by virtue of the contract, but by virtue of the filing under Section 205(c). *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

Since the filing of a contract has this effect, it is not surprising to find that Section 205(d) provides that a change in a contract-specified rate may be initiated by filing a new "schedule":

> "Unless the Commission otherwise orders, no change shall be made *by any public utility* in *any* such *rate*, charge, * * * *or contract relating thereto*, except after 30 days notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new *schedules* * * *" Section 205(d). [Emphasis added.]

If this wording is effective to permit ordinary rates to be changed through the filing procedure, as all admit, it must be equally effective to permit a contract-specified rate to be changed through the same procedure. This "filed rate" procedure has been widely adopted and in the great majority of jurisdictions is an accepted method for changing contract-specified rates. This subject is fully dealt with in the brief for the Federal Power Commission in *Federal Power Commission v. Mobile Gas Service Corporation*, No. 31, now before this court and we refer to Point II of that brief for a complete citation of authorities.

Congress did not, of course, leave public utilities free to change their rates at will. By Section 205 (a) and (b) the utilities must demand only just, reasonable and non-discriminatory rates. The statutory waiting period required by Section 205(d) before a filing can take effect is imposed

so that the Commission can examine the proposed rate and give opportunity for others to protest as Sierra did in the instant proceeding. The Commission vigilantly carries out its duty of review. By its rules it has enlarged the waiting period to 60 days where an increase in rates is proposed and requires a detailed showing in support thereof.[4]

The necessary power to make such review effective was given in Section 205(e) which authorizes the Commission "either upon complaint or upon its own initiative * * * to enter upon a hearing concerning the lawfulness of such [new] rate, * * * suspend * * * such schedule * * * 5 months, * * * and after full hearing * * * make such orders with reference thereto as would be proper in a proceeding initiated after it [the new rate] has become effective." The latter phrase means that the Commission is not restricted to consideration of a utility's filed proposal but may fix whatever it determines to be the just and reasonable rate. The burden of proof to establish the reasonableness of any proposed increase is placed squarely on the public utility. If the Commission does not determine the matter before the end of the five months suspension period, the rate may go into effect, but the utility must refund with interest any portion thereof found not justified.

Thus, Section 205 provides a comprehensive scheme which sets forth the standards for public utility rates and the method by which such rates are to be filed and changed, subject to Commission control.

This Court has already recognized, in *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414, 423, 424 (1951), that a utility may institute proceedings for the modification of a contract under Section 205 of the Act, where it said:

---

4. 18 C.F.R. 35.3(e).

"If Pennsylvania Water wishes to discontinue some or all of the services it has rendered for the past 20 years, the Act, as the Commission pointed out, opens up a way provided Pennsylvania Water can prove that its wishes are consistent with the public interest. Shortly after P. II of the Power Act was passed in 1935, Pennsylvania Water, as required by Section 205(c), filed with the Commission the *contract* here attacked and then designated by the Commission as 'Pennsylvania Water's Federal Power Commission Rate Schedule No. 1'. Section 205(d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto except after thirty days' notice to the Commission and the public'. Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the Company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate reduction order." [Emphasis added.]

The foregoing conclusion is amply supported by the consistent interpretation of the Act by the Commission which is charged with carrying out the purposes of the Act. Such interpretation should be followed so long as it is reasonable.[5] The Commission's interpretations are fully described in the brief for the Commission in the *Mobile* Case No. 31 above referred to, particularly Subdivision B of Point I.

2. Section 206(a) of the Act Does Not Authorize a Public Utility to Initiate a Rate Proceeding.

If, as we have shown, Section 205 of the Act is a complete statement of the duty of public utilities with respect to rates

5. *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130, 131 (1943). See also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

and provides the authority for review of the utilities' rate changing acts, then Section 206(a) falls naturally into place as a grant of authority to the Commission to exercise rate fixing powers, on its own initiative or on complaint, whenever the utility fails to act. The pertinent wording of Section 206(a) is as follows:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate * * * charged * * * by any public utility * * * or that any * * * contract affecting such rate * * * is unjust [or] unreasonable * * * the Commission shall determine the just and reasonable rate * * * or contract to be thereafter observed and in force, and shall fix the same by order."

This wording is not appropriate to authorize initiation of a rate proceeding by a public utility since "upon complaint" would not normally signify action by the public utility attacking its own rate. Where the public utility desires an increase in a contract-specified rate, it seems far more rational from a procedural standpoint[6] to require it to propose and bear the burden of proving the reasonableness of a substitute rate under Section 205(d) and (e) than merely to file a complaint about its existing rate under Section 206(a) and prove that rate unreasonable.

That the Congressional view of the meaning of "complaint" is the same as ours is clearly shown by Section 306 of the Act, relating to complaints generally, which provides that "any person, state, municipality, or State commission" may complain to the Commission "of anything done, omitted to be done, by any licensee or public utility in contravention of the provisions of this Act." Such language certainly does not contemplate complaint by a public utility against itself.

---

6. We deal with the substantive aspects under the next heading.

The conclusion is inescapable that the instant proceeding was properly initiated under Section 205(d). To reach the opposite result, it would be necessary to read an exception for contract-specified rates into Section 205(d) in the face of express language to the contrary and to read Section 206(a) as authorizing a utility to complain about its own rate. There are no considerations which require such rewriting of straightforward language.

B. THERE IS NO SUBSTANTIVE REASON WHY THE STATUTORY LANGUAGE SHOULD NOT BE LITERALLY APPLIED.

1. The Choice Does Not Lie Between a Procedure Which Abrogates Contracts and a Procedure Which Does Not.

The court below felt it necessary to strain the statutory language because, adopting Sierra's position, it thought that:

> "The novel and important question for decision is whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates."

This raises a false issue. All contracts for public utility service are subject to the exercise of the legislative power of regulation.[7] The possibility of change by regulatory powers does not nullify or abrogate such contracts. We are concerned here to determine how the Act specifies that con-

7. "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Munn v. People of Illinois*, 94 U.S. 113 at 134 (1876).

tracts shall be changed, not whether they shall be changed. All this is, of course, conceded by Sierra and assumed by the court below.

They insist, however, that to apply the "filed rate" process of the Act to contracts is to abrogate or nullify all rate contracts subject to the Act. Clearly, this does not follow. The possibility of change is inherent in all public utility service contracts. That the change may be initiated by a rate filing by one of the parties (or, indeed, by a complaint by the other) does not nullify the contract. The "filed rate" procedure is well recognized[8] and where it is prescribed any public utility service contracts which specify rates must imply the use of that procedure.[9]

These considerations also dispose of the court's adoption of a restrictive rule of interpretation because the taking away of a "common law right" was involved. No one has a right to a particular mode of regulation[10] and the contract here in question was entered into 12 years after the filed rate procedure of the Power Act was adopted.

2. The End Result, the Just and Reasonable Rate, Must Be the Same Under Either Procedure.

Whether the rate increase proceeding is initiated under Section 205(d) or under Section 206(a) the end result is the same: determination of the just and reasonable rate for the service rendered. In the event of a failure of proof under

---

8. This is fully covered in the Commission's brief in the *Mobile* case, No. 31. See its Point II C.

9. See e.g., *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110A. 778, 781 (1920), where the Pennsylvania Supreme Court said in holding that a filed rate may supersede a contract rate: "All public service contracts are viewed in the light of having been made with an implied provision that the rate named therein is subject to change, according to law, so as to keep it reasonable and non-discriminatory at all times."

10. See *Munn v. People of Illinois*, 94 U.S. 113 at 134 (1876), note 7.

either procedure, the contract-specified rate will remain in effect.

The differences in approach under the two procedures appropriately reflect the fact that Sections 205(d) and (e) are intended for the situation where the utility has a specific substitute rate to offer, whereas Section 206(a) is intended for the situation where the Commission or another person desires a change in an established rate.

Under Section 205(d) and the Commission's rules thereunder (18 C.F.R. 35.3(c)) the utility's proposed increased rate must be justified in the first instance by what might be called a *prima facie* showing. If this showing fails to satisfy the Commission or if a protest is received the next step is a hearing under Section 205(e) in which the utility has the statutory burden of proving that the increased rate is just and reasonable. If it fails to meet this burden, the old rate will remain in effect unless the Commission is satisfied by evidence that some other rate is the just and reasonable rate,[11] in which case the Commission may make such other rate effective.

Under Section 206(a), inquiry is directed to whether the existing rate charged by the utility is just and reasonable and, if not, the Commission must determine and fix the just and reasonable rate.

There is no doubt that the Commission's powers under Section 205(e) are as great as under Section 206(a), for the former section provides that "after full hearings * * * the Commission may make such orders with reference [to the rate] as would be proper in a proceeding initiated after it had become effective," i.e. as would be proper in a Section 206(a) proceeding.

---

11. See *Central Illinois Pub. Service Co. v. Illinois Commerce Commission*, 125 N.E.2d 269 (Ill. Supr. Ct., 1955).

Since the end result must be the same under either procedure, there is no reason to strain the statutory language in favor of one procedure because of a fear that an undesirable result would follow under the other procedure. Yet, just such a misapprehension was clearly a major factor in the decision of the court below.

The Court of Appeals thought that the result would be different because under Section 205(e) the Commission would first determine whether the *proposed* rate was reasonable, whereas under Section 206(a) the Commission would first determine whether the *existing* rate was reasonable. The court thought that *both* rates might be reasonable and therefore the result could depend upon which rate was examined first.

This is a surprising misunderstanding of the Commission's functions and duty in rate cases. True, as the court says, *statutory* reasonableness is an area, rather than a pinpoint, but this means that a *court* might have to accept either rate if the Commission found it reasonable. It is the Commission's duty, however, to pinpoint the reasonable rate. As this court said in the very case relied upon below: "To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."[12]

Judges determine the outer boundaries of the statutory area of reasonableness, but the Commission, as an expert body, makes a precise evaluation of the various elements of reasonableness. It does not choose a rate at random within the area. It weighs the various factors, which may include the circumstances of the contract, as in the instant case, and concludes for itself what is the reasonable rate. This

12. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, at 251 (1951).

is clearly what Congress intended it to do, for in Section 206(a) it directs the Commission to "determine *the* just and reasonable rate * * * to be thereafter observed and in force."[13] This negatives any idea that more than one rate could be reasonable at any given time for given conditions of service.

The difference between the two procedures, then, is merely procedural. The job of the Commission is the same in either case: to arrive at the just and reasonable rate. Under Section 205(e) the Commission goes directly to the issue of reasonableness of the substitute rate offered by the utility, and if it is not satisfied it may then determine for itself the reasonable rate to be charged. Under Section 206(a) the commission determines whether any change in rate is required and, if so, determines the reasonable rate to be charged.

Under either procedure, it is clear that all evidence relevant to determining the rate for the service in question will be admissible and entitled to consideration. Cost of service with its various elements such as operating expense, depreciation, rate base and rate of return is usually a major consideration, but other factors such as value of service, history of the rate, and other special circumstances may be relevant and if so will be considered by the Commission.

In the case at bar, for instance, in passing upon the reasonableness of the *proposed* rate, the Commission expressly considered not only the cost of service, which P.G.&E. contended should be the determining factor, but also the circumstances under which the contract-specified rate was established, which Sierra contended should be the determining factor. In finding that the proposed rate was cost-justi-

13. Emphasis supplied. As we have previously pointed out (p. 18), the Commission's powers under Section 206(a) are incorporated in Section 205(e).

fied and that Sierra's position on the contract circumstances was not in accord with the evidence, the Commission necessarily disposed of all issues relating to determination of the reasonable rate for service to Sierra. Sierra did not at the hearing, nor has it subsequently, suggested that it had any further evidence to offer.

Attention is directed to the fact that the Commission's determination of these issues was made in passing on the reasonableness of the *proposed* rate, before it passed to the question of whether it should make a finding, as requested by Sierra, on the reasonableness of the *existing* rate. This is important because it shows that in actual practice a hearing under Section 205(e) will encompass all issues which are relevant to determination of the reasonable rate. If the existing rate is relevant, it must be considered under the substantive provisions of Section 205(e) as well as under Section 206(a).[14]

We submit, then, that no consideration of substance require the use of Section 206(a) rather than Sections 205(d) and (e) to change a contract-specified rate.

C. THE INTERPRETATION OF THE COURT BELOW IS BASED UPON AN ERRONEOUS VIEW OF THE COMMISSION'S RATE MAKING AUTHORITY WHICH WOULD IMPAIR ITS EFFECTIVENESS.

The court below believed that the Commission under either procedure would merely review a rate[15] and, if it found that the rate in question lay within the statutory area of reasonableness, it would proceed no further. As we have shown, this confuses the Commission's function with the function of a court upon review, with serious consequences upon the Commission's powers in rate cases.

---

14. Undoubtedly, the assumption to the contrary by the Third Circuit Court of Appeals influenced its decision in the *Mobile* case (see infra, p. 27).

15. Under Section 205(e) the proposed rate; under Section 206(a) the existing rate.

Basically, this would mean that there is a statutory area within which the Commission has no power to fix rates. If, by contract, the utility and its consumers agree upon a rate, whether in the upper or lower range of the area, the Commission would not be able to act. Furthermore, in the absence of a contract, the utility would always be free to increase its rates to the upper limits of the area.

There is no ground for believing that Congress intended such a result. The statutory area is the entire area within which the Commission may exercise its expert judgment free of judicial interference. As Mr. Justice Reed said of the requirement of the Natural Gas Act that rates be just and reasonable:

> "When the phrase was used by Congress to describe allowable rates, *it had relation to something ascertainable.* The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.
>
> Such an abstract test is not precise. The agency charged with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. Cf. Chicago, M. & St. P. R. Co. v. Minnesota, 134 US 418, 461, 466, 33 L ed 970, 983, 984, 10 S Ct 462, 702, 3 Inters Com Rep 209, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required." (Emphasis supplied.)
>
> *Federal Power Commission v. Hope Natural Gas Co.*, 320 US 591, 621 (1944), dissenting opinion.

Passing over the fair value rate base, not involved here, it is submitted that this is an accurate characterization of the Commission's powers and duties. The view of the court below, however, would cut off the exercise of the Commission's special competence at the outer edge of the statutory area—the very point at which it should take over. There is no justification for such a conclusion. Under either Section 205(e) or Section 206(a) the Commission does not sit to review rate fixing activities of others; it sits to exercise its power to determine the just and reasonable rate.

An interpretation of the Act, such as that below, which is based on any more limited view of the Commission's functions and power must be rejected.

D. THE USE OF SECTION 205(e) GIVES BOTH PARTIES THE BENEFIT OF THE EQUITABLE COLLECTION AND REFUND PROCEDURE.

It is well-known that one of the serious problems in rate regulation is the result of delays in the rate-making process. During the course of a proceeding, the utility may be compelled to furnish service for a rate which is less than that ultimately determined to be reasonable, or, conversely, its customers may be compelled to pay a rate which is higher than that ultimately determined to be reasonable.

In Section 205(e), Congress prescribes a procedure to mitigate the effect of delay where a public utility proposes a change in rates. The Commission is authorized to suspend a proposed change for a period not to exceed five months. At the expiration of that time, the change may be placed in effect, but if the utility has proposed an increase, it must at the conclusion of the proceeding refund to its customers any increase above that which the Commission finds not justified. Thus, after an initial period in which the utility may be deprived of any benefit from a proposed increase, even though subsequently proved reasonable, the rates

actually charged are subject to adjustment so that the cost to the customer and the revenue to the utility coincide with the ultimate determination of the Commission as to reasonableness. Consequently, allowing the utility to place a rate increase in effect after the five months suspension period is fair to both parties.

There is no reason why this procedure should not be applied to proposed changes in contract-specified rates as well as to any other rates. In fact, if there were any doubt as to the application of Section 205(e) to contract-specified rates, we submit that this Court should adopt the interpretation which permits the use of this equitable procedure.

Section 4(e) of the Natural Gas Act presents a different problem because of the prohibition against suspension of a rate for gas which is resold for industrial use only, the situation involved in the *Mobile* case. For such sales, Congress provided that the utility should be entitled to collect the increase while the rate case was pending. Thus, the utility may be entitled to retain some charges collected in excess of those ultimately found to be reasonable. Under the rule of the Third Circuit in *Mobile* this would not be allowed where the rate was contract-specified. That result, however, was no more equitable than the one which the Commission reached, for the customer might well enjoy service during pendency of the proceeding at a rate less than that ultimately found to be reasonable.

It is seen that three possible methods of dealing with the problem of delay in rate increase proceedings have been adopted by Congress. (1) In Section 205(e) of the Power Act and in the general case under Section 4(e) of the Gas Act, Congress has required the utility to bear the burden of delay for a five-months period, but thereafter permits a rate which is ultimately adjusted to that which is just

and reasonable for the service rendered. (2) Under the proviso of Section 4(e) of the Gas Act, the purchaser for resale for industrial use must bear the burden until the case is determined. (3) Under Section 206(a) of the Power Act and Section 5(a) of the Gas Act where a rate increase is involved the utility must bear the burden of delay.

There is no reason to suppose that in setting up these different methods, Congress intended the existence of a contract to have any effect on their application. Certainly, there should be no quarrel with the use of the Section 205(e) procedure in the case at bar. PG&E was compelled to forego any increase for a period of five months. After that period, the cost to Sierra and the amount ultimately retained by PG&E could not exceed the just and reasonable rate for the service rendered. Furthermore, if it had been found that PG&E had collected any more than the just and reasonable rate, it would have been required to pay Sierra 6% interest on the excess amount.

Clearly, then, the collection and refund procedure of Section 205(e) is just as fair and equitable to the contract customer as to any other customer and should be applied equally to both. It cannot be emphasized too strongly that under Section 205(e) neither a contract-specified rate or any other rate can be effectively increased except to a rate which is found by the Commission to be just and reasonable.

E. THE MOBILE AND WICHITA CASES DO NOT SUPPORT THE HOLDING OF THE COURT BELOW.

The court below relied primarily upon *Mobile Gas Service Corporation v. Federal Power Commission*, 215 F.2d 883 (1954) which, as we have mentioned before, is now before this court on writs of certiorari to the Third Circuit Court of Appeals (Cases No. 31 and 17). The opinion of the Third

Circuit in turn relies principally upon *Wichita R.R. & Light Company v. Public Utilities Commission*, 260 US 48 (1922).

1. The Court Below Erred in Relying on Mobile.

The basic errors of the *Mobile* decision are substantially the same as those of the court below in the instant case which we point out in the foregoing portion of this brief. These errors are analyzed and ably discussed in the brief for the Federal Power Commission before this court in *Mobile* (No. 31) and we need not repeat what is there said.

However, even should this Court sustain the Third Circuit in *Mobile*, it would not be controlling on the issue of interpretation because the decision in that case was strongly influenced by the limitation on the suspension provisions of Section 4(e) of the Natural Gas Act involved in that case, unlike Section 205(e) of the Federal Power Act.

Under Section 4(e) suspension of rates for gas to be resold for industrial use, the type of sale involved in *Mobile*, is prohibited. There is no comparable limitation on the Commission's powers of suspension under Section 205(e). While the court below asserted that this distinction was in no way determinative, and did not express an opinion as to whether or not it should have been, it seems clear that such consideration was in fact of great importance to the majority in *Mobile* for, in distinguishing the case of *Tyler Gas Service Co. v. United Pipeline Co.*, D.C. Tex., December 23, 1953 (affirmed 217 F.2d 73 (5th Circ. 1954)), the Court said:

> "It should be emphasized also that the fact that *Tyler* concerned a rate for sale of gas for domestic use of itself *sets that action apart from the issue of this appeal.* In *Tyler* under Section 4(e) the Commission could and did suspend the effective dates of the increased rate for 5 months, after which period it could order any subsequent collections to be subject to refund

in the event the new rates were ultimately found to be unlawful." (Emphasis added).[16]

Thus, the circuit court did not purport to express an opinion on the situation where, as here, suspension was possible and in fact ordered by the Commission. By so carefully pointing out this distinction, the decision implies that had suspension been possible in *Mobile* the Court might well have felt bound to follow the *Tyler* decision. In other words, the Third Circuit Court undoubtedly felt impelled to reach its conclusion in large measure because the increase became effective without possibility of refund before any hearing could be held on the matter.

The *Mobile* case is of no value as authority in this case in other respects. The Court there assumed that under Section 4(e) "No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long-term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts."[17] This assumption was entirely unjustified since it is well established that the Commission must take into account all aspects of the public interest and, to the extent that they were relevant to the public interest, the court should have assumed that the recited matters would be considered. This is exactly what the Commission did in the instant case under the Federal Power Act when it received evidence on and considered all of the matters which the Court in *Mobile* assumed it would ignore.

Finally, the Court in *Mobile* tried to distinguish the decision in *Midland Realty Co. v. Kansas City Power & Light*

16. 215 F.2d 883, 885 (1954).

17. 215 F.2d 883, 886 (1954).

Co., 300 U.S. 109 (1937), which the Court admitted gave some support to the Commission on two grounds: (a) that Midland did not assert its contract before the Commission, but attempted to attack the rate increase collaterally, and (b) that the decision was based upon a State Court interpretation of a State Statute.[18] The second ground is, of course, equally applicable to the decision in the *Wichita* case on which the Third Circuit relied. The first ground points up the fact that there is no lack of jurisdiction in the Commission to modify a contract rate by the method adopted below, for if it were a jurisdictional matter it would seem that it could be raised collaterally. The *Mobile* decision would imply that the existence of a contract is at most a type of affirmative defense which is waived if not presented before the Commission. Even so, it could not be an absolute defense, for to make it so would permit a utility by contract to deprive the Commission of its rate-fixing power. At most, therefore, an existing rate contract can be but one matter to be considered by the Commission in determining whether a rate increase requested by a public utility is in the public interest, and such consideration was in fact given by the Commission below. Finally, the Court missed the real point of the *Midland* case which is, simply, that there is no constitutional objection to the "filed rate" policy of rate making.

2. The Reasoning of Wichita Is Not Applicable to the Case at Bar.

In *Wichita*, this court had before it for review a proceeding of the Kansas Public Utilities Commission made upon pleadings and heard under the provisions of Section 13 of the Public Utility law of Kansas.[19] This section, in language similar to Section 206(a) of the Federal Power

18. 215 F.2d 883, 887 (1954).

19. Kan. Sess. Laws 1911, c. 238.

Act, conditioned the power of the Commission to change rates upon a finding that the existing rate was unjust or unreasonable. The order of the Commission changing a contract-specified rate was attacked on the ground that no such finding had been made. This court held that for lack of such a finding the Commission's order was void.

Section 20 of the Kansas Act permitted a change in rates to be made effective by a filing with the consent of the Commission. Although this is similar in some respects to Section 205(d) of the Federal Power Act, no provision was made in the Kansas Act for a hearing after such filing, as is provided by Section 205(e) of the Federal Power Act. The court did not have before it[20] the effect of a filing under section 20 and its comments thereon may be disregarded for the purposes of this case because (1) they were purely *dictum*, (2) they refer to a rate filing procedure which does not provide for a hearing as does Section 205, and (3) they were based entirely upon a construction of the Kansas Act by the Kansas Supreme Court in a prior case and hence do not represent the independent judgment of this Court. In view of the full discussion of the *Wichita* case in the brief before this Court for the Commission in the *Mobile* case, Case No. 31, further elaboration of our argument with respect to the *Wichita* case is unnecessary here.

II. In Any Event, the Commission Actually Found, Upon an Expressly Framed Issue, that the Contract-Specified Rate Was Unreasonable Before Authorizing the Rate Increase.

The first point of the argument has shown that the instant proceeding was properly initiated under Section 205 of the

20. "The section does not, therefore, cover, or measure the essentials of, the proceeding in the case before the Commission, which the order shows was upon pleadings and *inter partes*." *Wichita R R. v. Pub. Util. Comm.*, supra, at p. 57.

Act. This second point will show that in any event the substantive requirements of Section 206(a) have also been squarely and expressly met and therefore the Commission's order should have been upheld even under the court's rationale.

The only difference between the Section 205 and Section 206(a) procedures considered by the court below was the requirement of the latter that a rate change be made only if the Commission finds that the existing rate is unreasonable. We have pointed out that this requirement of Section 206(a) adds nothing of substance to what the Commission is required to do under Section 205(e). However, even if the view of the court below were accepted, the Commission's order should still have been affirmed for the plain reason that the Commission made the required finding, not by indirection or implication, but in clear and unmistakable language after careful consideration upon an issue duly framed by the parties. This finding was made in a separate portion of the Commission's opinion dealing with Sierra's contention that this case was governed by Section 206(a). Undoubtedly, the finding was made for the very purpose of making further proceedings unnecessary in the event that the Commission had misconstrued Section 205 of the Act.

Despite the Commission's clear language to the confrary, the Court below assumes that the Commission did not find the 1948 contract-specified rate to be unreasonably low and hence unlawful. Furthermore, by its order directing dismissal of the proceedings, the Court below usurps the function of the Commission and makes impossible the correction of the alleged error in the original proceeding.

The Commission, in the new proceeding contemplated by the Court below, will have no power to grant reparations. Consequently, PG&E would be deprived by the Court's

order of any increased revenue from Sierra for a period of more than two years, that is, since the effective date of the rate under review. Commission consideration of the reasonableness of that increased revenue would be precluded. Neither sound administrative procedure nor the requirements of judicial review necessitate such an unjust result.

A. THE ISSUE OF WHETHER THE 1948 CONTRACT-SPECIFIED RATE WAS REASONABLE OR UNREASONABLE WAS PRESENTED TO THE COMMISSION IN THIS PROCEEDING.

In an administrative proceeding, such as this, formal pleadings are not encouraged. Furthermore, the Federal Power Act specifically provides that "no informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation, issued under authority of this Act."[21]

To determine whether an issue was raised in an administrative proceeding so that it may be decided in that proceeding is merely to see that the essential requirements of due process were met, namely, that the parties were sufficiently informed of the points at issue. The purpose is to afford parties a full opportunity to present testimony and to prevent surprise. The record in this proceeding shows that both Sierra and PG&E considered the reasonableness of the 1948 contract-specified rate to be an issue and that evidence, argument, and proposed findings were received from them on that issue by the Commission. Furthermore, the question of the reasonableness and hence the lawfulness of the 1948 contract-specified rate was raised right at the start of, and on numerous other occasions during, this proceeding. A brief review (R. 491) of some of the salient points in the record demonstrates this.

---

21. Sec. 308; 16 U.S.C. 825g.

The Commission, in suspending PG&E's rate filing and ordering a hearing, stated Sierra's contention to be that the 1948 contract-specified rate "is just and reasonable and not unduly preferential or discriminatory because of other considerations for the rendering of service, at the time the present agreement was entered into." (Order of March 12, 1953, R. 431-434). In permitting Sierra to intervene in this proceeding and denying Sierra's request for rejection of the rate filing because not authorized under Section 205(d) of the Federal Power Act the Commission expressly stated that the denial was without prejudice to Sierra's right to maintain its contentions. Furthermore, in refusing Sierra's petition for rehearing on the order denying Sierra's request for rejection of the filing, the Commission said that its denial "was conditioned to preserve to Sierra its right to maintain thereafter in this proceeding the contentions then advanced by it and did not constitute a final determination by this Commission of the substantive issue as to which Sierra now seeks rehearing."

At the hearing, the Examiner for the Commission took the position that he was required to admit evidence material to Sierra's contentions in view of the Commission's preservation of Sierra's rights and all such evidence offered by Sierra was received. The Commission stated in its opinion that "all parties were afforded an opportunity to present evidence in support of their respective positions" (R. 446).

At the conclusion of the hearing, PG&E submitted proposed findings including a finding that the contract rate is unjust and unreasonable. Sierra submitted at the conclusion of the hearing proposed findings that the 1948 contract-specified rate is just and reasonable and that PG&E failed to show the contrary.

In rendering its opinion the Commission gave careful and detailed consideration to the lawfulness of the 1948 contract-specified rate, not merely as an incident to the issue of lawfulness of the proposed rate but in a separate portion of its opinion directed to this very issue (R. 464-466).

When the court below and Sierra urge that the Commission in this proceeding may not find the 1948 contract-specified rate unlawful, they go counter to the present practice of courts. The courts have taken the position for many years that where a party clearly understands the issue he cannot take advantage of a technical defect in the manner of stating the issue.[22]

B. THE COMMISSION EXPRESSLY FOUND THE 1948 CONTRACT-SPECIFIED RATE TO BE UNREASONABLE.

A reading of the Commission's opinion shows that it found the 1948 contract-specified rate to be unlawful. It did this several times and very clearly.

First, the Commission said:

> "* * * we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful." (R. 464).

Second, it pointed out that:

> "* * * none of the evidence in this record warrants a finding that any rate would be reasonable that would

22. *New York Central & H. R. R. Co. v. Interstate Commerce Commission*, 168 Fed. 131, 138-139 (C.C.N.Y. 1909). See, for example *National Labor Relations Board v. Mackay Radio & T. Co.*, 304 U.S. 333, 350 (1938) where the court said: "While the respondent was entitled to know the basis of the complaint against it and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."

produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum P. G. and E. is willing to accept" (R. 464).

Third, after considering Sierra's arguments including those concerning undue discrimination and preference, the Commission stated:

"But no such considerations, on this record, warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful" (R. 466).

But the Commission did not make merely the bald finding that the 1948 contract-specified rate is unlawful, it discussed the evidence bearing on this issue which had been presented to the Commission by both Sierra and PG&E throughout the hearings. Hence the path[23] which the Commission followed in making this finding can be discerned readily from its opinion.

It is clear, therefore, that despite the statement of the court below, the Commission literally found the 1948 contract-specified rate to be unlawful even though it believed such finding to be unnecessary and so stated.

The court below, in concluding that no such finding was made, may have relied on the fact that it was not among the numbered formal findings at the end of the Commission's opinion. But all findings need not be formally listed and numbered. The Commission expressly incorporated the finding as to the unreasonableness of the 1948 contract-specified rate as a part of its formal findings by prefacing the numbered list with the following introductory statement:

---

23. Even where findings of a Commission are inadequate, this court has upheld the Commission's determination where "the path which it followed can be discerned." Cf. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 595 (1945).

"The Commission, having considered the record with respect to the matters involved and the issues presented and having issued its Opinion No. 270 which is hereby incorporated by reference and made a part hereof, *further finds:*" (R. 466). [Emphasis added.]

To say that under such circumstances the Commission has not found that the 1948 contract-specified rate was unreasonable and unlawful is to give weight to form and to ignore substance. "It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision."[24]

C. EVEN ASSUMING THAT AN EXPRESS FINDING WERE LACKING THERE IS AN IMPLIED FINDING WHICH IS SUFFICIENT TO SUPPORT THE COMMISSION'S ORDER.

The procedural question presented here is whether the court of appeals may ignore what the Commission expressly said it would have found concerning the prior rate if such finding were deemed necessary.

In judicial proceedings a failure of a court to make a finding on a determinative issue does not warrant reversal where evidence supports an implied finding which if expressly made would be adverse to an appellant.[25] Furthermore, although the general rule is that a finding outside the issues pleaded must be disregarded, modern procedure does not permit parties who voluntarily submit and try an issue without any specific pleadings to complain when the findings

---

24. Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. 2d 554, 559 (C.C.D.C. 1938), *cert.* denied *Gross, v. Saginaw Broadcasting Co.*, 305 U.S. 613 (1938); Accord. *Johnston Seed Co. v. United States*, 191 F. 2d 228, 230, (10th Circ. 1951).

25. *Beiniger v. Hassell*, 216 Cal. 269, 13 P. 2d 737 (1932); *Kustoff v. Chaplin*, 120 F. 2d 551 (1941).

concern such an issue not within the pleadings.[26] *A fortiori*, an implied finding in an administrative proceeding, where all issues are not necessarily framed as specifically as in judicial proceedings, should not be ignored and given no effect. It is not necessary for the Commission to set out its findings in the formal style and manner customary in trial courts.[27]

III. It Was Error to Order the Proceeding Dismissed when the Finding, If Required, Could Have Been Supplied on Remand and When Dismissal Would Constitute a Rate Decision Which Only the Commission Could Make.

A. EVEN IF THE COMMISSION HAD NOT FOUND THE 1948 CONTRACT-SPECIFIED RATE TO BE UNREASONABLE, IT SHOULD BE PERMITTED TO DO SO IN THIS PROCEEDING.

Even if the Commission had said nothing in its opinion and order concerning the unreasonableness of the 1948 contract-specified rate, it should not be precluded from making a finding concerning it in this proceeding.

Assuming for the moment that the court below is correct in insisting that the Commission may not authorize the new rate without first expressly finding that the previously filed 1948 contract-specified rate is unjust and unreasonable, both justice and its efficient administration require the court to authorize the Commission to correct its error *in this proceeding*. To throw out the days of hearing, the exhibits and the arguments in this proceeding before the Commission will cause injustice as well as a great waste of effort and expense.

By remanding the case to the Commission for further proceedings the Commission would have an opportunity to

---

26. *Freeman v. Gray-Cowan, Inc.*, 219 Cal. 85, 25 P. 2d 415 (1933).

27. Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission*, *supra*, fn 24.

correct its alleged error and to fix the just and reasonable rate in accordance with law. Neither Sierra nor PG&E would then be prejudiced by the alleged failure of the Commission to have made a formal finding on the 1948 contract-specified rate. To proceed otherwise and thereby to require an entirely new proceeding to be instituted could mean that Sierra would have had the advantage of the 1948 contract-specified rate during a period when it was unreasonably low. Such a result flies in the face of the intent of Congress, expressed in Section 205(e), that a selling utility, when it files a new rate, may have a new rate go into effect (subject to refund) not later than five months after its proposed effective date.

Since the rate increase became effective on September 6, 1953, PG&E has collected increased charges from Sierra at the higher rate. The increase was originally estimated at about $420,000 per year and has actually exceeded that amount because of increased sales. If the Commission should find that the contract rate was reasonable, this increase would have to be refunded to Sierra. If, on the other hand, the Commission makes a contrary finding, PG&E in equity and good conscience should be entitled to retain the increase since the unreasonableness will relate to the entire period during which the increase was collected. See *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935).

The proceeding to date has occupied the time and attention of a considerable number of persons, including the Commission itself, and engineers and other experts on the staff of the Commission, and in the two utilities. To ignore the existing record in a new proceeding would be both wasteful and unnecessary.

Sierra was given and took every opportunity during the proceeding to present its case concerning the reasonableness of the contract rate. Sierra went into great detail in describ-

ing the circumstances and negotiation of the 1948 contract in an effort to establish that the 1948 contract-specified rate was a just and reasonable one. Since all material pertinent to the issue of the reasonableness of that rate was introduced in the proceeding, the initiation of a new proceeding, merely because the Commission at the conclusion of the hearing stated that a finding concerning the 1948 contract-specified rate was unnecessary, would serve no useful purpose. The new proceeding would be but a duplication of the prior hearings.

That the present proceeding was initiated as a result of the filing as provided for under Section 205(d) rather than a complaint under Section 206(a) should not govern the result. To permit this case to depend upon how it was initiated would indeed be harking back to the days when a common law plaintiff selected a writ at his peril, and the result would be just as inequitable in this modern administrative proceeding as it became under the technical and inflexible common law procedure.

Sierra cannot be prejudiced in any sense by returning the case to the Commission for a more formal determination as to the unreasonableness and hence unlawfulness of the 1948 contract-specified rate if such is deemed necessary. If Sierra's contention is sustained, it will lose nothing. If not, it will be charged only with the rate which is just and reasonable in accordance with the law as laid down by the court below.

B. THE COURT BELOW, BY REFUSING TO PERMIT THE COMMISSION IN THIS PROCEEDING TO FIND UNREASONABLE THE 1948 CONTRACT-SPECIFIED RATE, HAS USURPED THE COMMISSION'S REGULATORY AUTHORITY.

By refusing to permit the Commission the opportunity to correct its alleged mistake in this proceeding, the court below has invaded the functions of the Federal Power Com-

mission. Having pointed out the alleged mistake of law which it believes affected the Commission's decision, the court below should have sent the case back for further proceedings if deemed appropriate by the Commission. *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17 (1952). However, the court below remanded the case to the Commission with instructions to dismiss the present proceeding. This has the same practical effect as if the Commission had decided that the 1948 contract-specified rate should be maintained. In this connection it should be remembered that, unlike the usual judicial proceeding, the administrative fixing of rates is a constantly recurring matter in which the time of decision and the effective date of the decision are most important.

Any alleged failure of the Commission to make a finding as to the reasonableness of the 1948 contract-specified rate is not the equivalent of a finding of the reasonableness of that rate, especially when the Commission has expressed its conclusion to the contrary. Although the court below may not have believed that it was making that decision for the Commission, it has done so, in effect, by ordering the dismissal.

In short, the order of the court below amounts to a finding that the 1948 contract-specified rate is the lawful rate; but only the Commission by statute is authorized to make such a finding. By ordering the Commission to dismiss this proceeding the court below has acted in disregard of the firmly established principle that courts will stay their hands until the expert administrative agency to which Congress has entrusted a policy or factual determination has had the opportunity to act. *Far East Conference v. United States*, 342 U.S. 570 (1952).

> "* * * the guiding principle, violated here, is that the function of the reviewing court ends when an error of

law is laid bare. At that point the matter once more goes to the Commission for reconsideration."[28]

IV. The Order of the Commission Is Fully Supported by the Evidence.

The opinion of the court below does not consider Sierra's argument that the lawfulness of the new rate is not supported by the evidence. Since this court in order to affirm the Commission's order may wish to assure itself that the Commission's order is fully supported by the evidence, we review briefly the pertinent parts of the record. We shall show that the Commission's findings, namely, (1) that the new rate is lawful, and (2) that the 1948 contract-specified rate is unlawful, are fully supported by the evidence.

A. THE LAWFULNESS OF THE NEW RATE IS SUPPORTED BY THE EVIDENCE.

1. The Cost of Service Method of Testing Reasonableness Shows the New Rate To Be Reasonable.

With the new rate in effect, the rate of return to PG&E based on the cost of rendering the service to Sierra would be less than 5½%. Sierra stipulated that 5½% would be a reasonable rate of return for PG&E's electric operations as a whole (R. 21). The evidence showed that the estimated rate of return under the new rate would be 3¼% under PG&E's methods of computation and 4¾% under the Commission's methods (R. 295).

2. The Rate of Return Under the New Rate Will Not Exceed the Rate of Return Expected Under the 1948 Contract-Specified Rate.

The Commission expressly considered the possibility that PG&E's entry into the 1948 contract showed that the then foreseeable rate of return under that contract would be the

---

28. *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

rate of return which is still reasonable for service to Sierra. Without passing upon the question of whether this was a proper basis for determining the reasonable rate of return, the Commission found that, due to increases in cost which occurred in the five years subsequent to negotiation of the contract, the proposed increase would merely restore the reasonably foreseeable rate of return, not go above it. (R. 452) This conclusion was fully supported by Exhibit 35 Revised (R. 356-408), which was summarized and discussed in the Commission's opinion (R. 452-454). Sierra's attempt to use certain other computations to show a contrary result was considered at length by the Commission and rejected. This brief will not consider the matter further because it is clear that the Commission's conclusion was fully supported by the comparison of rates of return under costs actually experienced with rates of return on the basis of costs actually forecast by PG&E's management. Even the figures on which Sierra attempted to rely showed the need for an increase in rates to cover increased costs.

3. The Commission Gave Careful Consideration to Sierra's Special Situation Arguments and Rightly Rejected Them.

Sierra's arguments centered on the contention that by the 1948 contract it gave up opportunities to obtain power from other sources of supply, its evidence being directed primarily to discussions with the Bureau of Reclamation as to possibly obtaining power from the Bureau's Shasta Dam. The following evidence in the record substantiates the Commission's finding that "in 1948 Sierra regarded other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source":[29]

29. R. 451.

(1) Sierra's own intra-company memoranda (R. 347-355) which state the reasons why Sierra found Bureau of Reclamation power unacceptable.

(2) The Bureau could not possibly deliver any power to Sierra prior to 1951 (R. 27, 36-37, 211). Hence the Bureau could not be considered a competitive source for power which had to be available in 1949 and thereafter to avoid a power shortage. Sierra could not construct new plants in time to supply its needs, for its president and its engineer testified that construction of additional plants would take at least three years.

(3) The Bureau could not have provided the firm source of power needed to carry Sierra's utility load, because of the possibility of serious and prolonged interruption of service over a single long transmission line over rugged terrain and the further possibility of inadequate water supply for Bureau generation (R. 37-38, 40-41, 222-226, 229-230, 347-348, 350, 351, 353-355).

(4) A contract with the Bureau would have required Sierra to wheel, that is, transmit electric power, for the Bureau to preference wholesale customers, making municipalities served by Sierra subject to raids by "public power" advocates (R. 345-346, 347, 355).

(5) The Bureau of Reclamation rates would have been subject to possible future increases (R. 347, 315-316).

B. THE UNREASONABLENESS OF THE 1948 CONTRACT-SPECIFIED RATE IS WELL ESTABLISHED BY THE EVIDENCE.

As we have stated before, a separate consideration of the unreasonableness of the contract-specified rate does not bring into play any factors in addition to those involved in determining the reasonableness of the proposed rate. However, for completeness, we consider the evidence from

the standpoint of the contract-specified rate to show that the Commission's finding that it is unreasonable is fully supported.

The rate of return under the contract-specified rate for the test year 1952 based on the method of computation requested by the Commission staff was 2.60%.[30] This rate of return was clearly unreasonably low by comparison with the 5½% rate of return which Sierra and the Commission stipulated is reasonable for PG&E's operations.[31] This alone would support the Commission's conclusion.

The only controversy arises from Sierra's attempt to prove that special circumstances relating to the 1948 contract required a conclusion that the contract-specified rate remained reasonable, despite the decline in rate of return. It was clearly established that the poor rate of return derived from service to Sierra in 1952 was the result of the very substantial increases in PG&E's costs after negotiation of the 1948 contract.[32] It was necessary, therefore, for Sierra to show that its contract with PG&E should insulate it against rate increases as a result of increases in PG&E costs.

It is clear that a contract for utility service specifying a rate does not grant immunity from rate changes as a consequence of cost changes. This follows from the fact that,

---

30. See Exhibit 19 (R. 295).

31. R. 21.

32. R. 356-408, especially table at R. 363. In referring to this exhibit, it should be noted that the rates of return developed therein are not directly comparable with the rates of return shown in Exhibit 19, such as the 2.60% above mentioned, because of different methods of approach. The methods used in Exhibit 35, Revised, were adopted to simplify the task of making comparative studies for a period of years. It was not disputed that these methods validly show the relative rates of return under the various assumptions considered in that exhibit.

as even Sierra concedes, contract-specified rates are subject to change by regulatory authority and the fact that cost of service is a primary consideration when a regulatory authority is engaged in the rate-making process. It can scarcely be contended that a utility could assert the existence of a contract to avoid a rate decrease when its costs decline.

The Commission's decision in this case was based on the conclusion that no special effect should be given to the fact that the rate to be increased was embodied in a contract. In 1948, shortly after the contract was negotiated, Sierra was of the same opinion for, in explaining the reason for having a contract for a 15-year term, its president stated this was to provide "a proper return on the investment for that period" by PG&E to provide capacity to serve Sierra (R. 207).

The Commission was convinced after consideration of Sierra's arguments that sufficient reason was not shown for departing from its cost of service approach. There is no reason for a Court to substitute any other conclusion for that of the Commission.

CONCLUSION

It is submitted that this rate increase proceeding was lawfully initiated, that all issues which had any possible relevancy to a determination of the just, reasonable and lawful rate for service to Sierra were fully considered by the Commission and expressly disposed of by its opinion and order herein and that its conclusions were fully supported by the evidence. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing the proceed-

ings before the Commission should be reversed and the opinion and order of the Commission should be affirmed.

Respectfully submitted,

ROBERT H. GERDES
F. T. SEARLS
245 Market Street
San Francisco 6, California

ROBERT E. MAY
WHEAT, MAY AND SHANNON
520 Shoreham Building
Washington 5, D. C.

Attorneys for Petitioner, Pacific Gas and Electric Company

Of Counsel:

JOHN C. MORRISSEY
MALCOLM A. MACKILLOP
245 Market Street
San Francisco 6, California

(Appendix follows)

APPENDIX

Sections 205 and 206 of the Federal Power Act (Act of August 26, 1935, c. 687, 49 Stat. 851-2; 16 U.S.C. 824d) read as follows:

Rates and Charges; Schedules; Suspension of New Rates

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge,

classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification,

or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Fixing Rates and Charges; Determination of Cost of Production or Transmission

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so

without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.